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No. 5692

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SACRAMENTO SUBURBAN FRUIT LANDS COMPANY (a corporation),

Appellant,

vs.

EMIL JOHNSON,

Appellee.

BRIEF FOR APPELLANT.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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STATEMENT OF FACTS.

By complaint filed August 11, 1927, plaintiff prayed for the recovery of damages in the sum of nine thousand ($9000.00) dollars for a fraud alleged to have been committed by the defendant in the exchange of a tract of land in the Rio Linda Colony near Sacramento for a tract of land in the State of Minnesota, in February, 1923.

It is alleged that appellant represented to the appellee that the land in question was rich and fertile; was capable of producing all sorts of farm products and crops; was entirely free from all conditions and things injurious or harmful to the growth of fruit trees; that the land was perfectly adapted to the rais-

ing of all kinds of fruits, and would produce an abundance of fruit of the finest quality.

It is then averred that these representations were untrue and that the real value of the land was $150.00.

A general demurrer was interposed and overruled.

Then appellant answered, denying the allegations of the complaint.

The case was tried by a jury and a verdict was rendered in favor of the plaintiff for $1850.00.

SPECIFICATION OF ERRORS.

I.

The Court erred in overruling the demurrer to the complaint.

II.

The Court erred in sustaining an objection to questions asked the witness, H. M. Edmunds. (Page 20 of Transcript.)

III.

The Court erred in sustaining an objection to questions asked Lambert Hagel. (Page 21 of Transcript.)

IV.

The Court erred in sustaining an objection to a question asked E. M. Traxler. (Page 22 of Transcript.)

V.

The Court erred in striking out part of the testimony of M. A. Crinkley. (Page 23 of Transcript.)

VI.

The Court erred in instructing the jury on the question of representations alleged to have been made by defendant. (Transcript, page 25.)

VII.

The Court erred in refusing to give defendant's proposed instruction on the question of intent. (Transcript, page 26.)

VIII.

The Court erred in instructing the jury that the alleged representations induced plaintiff to buy. (Transcript, page 25.)

IX.

The Court erred in instructing the jury on the question of the statute of limitations and in the instructions given by the Court upon that subject. (Transcript, page 27.)

X.

The Court erred in instructing the jury on the subject of inducement. (Transcript, page 26.)

I.

THE COURT ERRED IN OVERRULING THE DEMURRER TO THE COMPLAINT.

The cause of action is barred on its face unless the running of the statute is avoided by pleading appropriate facts showing that the fraud was not discovered within three years prior to the filing of the

action. No such facts are pleaded. The only statement on the subject is, "that plaintiff did not discover the falsity of said representations until the spring of 1927." This point is fully presented in the authorities cited in the appeal filed in this Court in the case of *Sacramento Suburban Fruit Lands Company, a corporation, appellant, v. Walter A. Melin, appellee,* No. 5671. We refer to that argument and adopt the same as a part of this brief.

II.

THE COURT ERRED IN THE RULING EXCLUDING THE TESTIMONY OF THE WITNESS H. M. EDMUNDS.

The witness testified as follows:

> "Q. What in your opinion would be the value of land in the district in which the Emil Johnson property is located in the month of February, 1923?
>
> Mr. McCUTCHEN. Objected to as incompetent, irrelevant and immaterial, and the proper foundation not laid.
>
> The COURT. I hardly think the competency of the witness has been shown. Objection sustained.
>
> Mr. BUTLER. Exception. That is all." (Transcript page 63.)

This same ruling was made in the case of *Sacramento Suburban Fruit Lands Company, a corporation, appellant, v. Paul and Ella Boucher, appellees,* No. 5655. We refer to the discussion contained in that brief and submit that on the authority of *Spring Valley Water W. v. Drinkhouse,* 92 Cal. 528, the error was erroneous and prejudicial.

III.

THE COURT ERRED IN SUSTAINING AN OBJECTION TO THE QUESTION PROPOUNDED TO WITNESS LAMBERT HAGEL.

The main issue in the case was the adaptability of the tract of land to the production of fruit.

The plaintiff called Lambert Hagel, is the owner of a tract of land near that of appellee, and is very successful in producing fruit and vegetables in similar soil. He was familiar with the entire district and knew the location of the lands of appellee. It was only a mile and a half from his tract. The testimony and ruling was as follows:

> "Q. Do you know any reason why you cannot raise fruit and vegetables and grape-vines on that soil the same as you have on yours with proper attention?
>
> Mr. McCutchen. Objected to. I don't think the question—he says, 'Do you know any reason' why he couldn't.
>
> The Court. Sustained. He says he doesn't know anything about it.
>
> Mr. Butler. Exception. That is all." (Transcript page 67.)

The objection was addressed to the weight of the testimony and not its admissibility. The appellant was entitled to present to the jury the opinion of this practical farmer on this colony with reference to the Johnson land. It was a part of the tract with which he was familiar, and to exclude it on the ground that he had not been on the particular tract is unjustifiable. The Court was in error in suggesting in the ruling that the witness had stated that he did not know anything about the Johnson place.

IV.

THE COURT ERRED IN EXCLUDING THE TESTIMONY OF THE WITNESS E. M. TRAXLER.

This witness had testified with reference to the land situated in the Arcade Park and similar to Rio Linda. Appellant was entitled to interrogate the witness in reference to the advantages of the land in Arcade Park as compared with those in Rio Linda. The testimony appears on page 23 of the transcript:

> "Q. Comparing again the lands in the Arcade Park District, what were those lands sold for?
>
> Mr. McCutchen. Objected to as incompetent, irrelevant and immaterial.
>
> Mr. Butler. Withdrawn. What was the reasonable value of that land on an acreage basis, in the Arcade Park section?
>
> Mr. McCutchen. Same objection. He is cross-examining his own expert.
>
> Mr. Butler. I think I have the right—that is withdrawn.
>
> Q. Do you have in the Arcade Park District any advantages which they have in Rio Linda?
>
> Mr. McCutchen. The same objection.
>
> The Court. Sustained.
>
> Mr. Huston. Exception." (Transcript page 81.)

V.

THE COURT ERRED IN STRIKING OUT PART 4 OF THE TESTIMONY OF THE WITNESS, M. A. CRINKLEY.

The testimony is as follows:

> "Q. You say that this land cost $85, and $100 an acre. As a matter of fact, wasn't that bought years before you became connected with the company?
>
> A. I already testified it was bought in 1911 and I became identified with the company in 1915.

Q. You didn't have anything to do with the sale? You weren't there when they made the transaction?

A. I wasn't there when they purchased the land.

Q. All you know about it is what somebody tells you?

A. Let me finish my answer.

Q. Of your own knowledge.

A. Yes, I know all about it.

Q. How do you know?

A. Mr. McCutchen, I came out in the year 1916 and paid to the Sacramento Valley Development Company several hundred thousand dollars in cash, and if a man doing that doesn't know about the transaction, I don't know——

Q. You don't know of your own knowledge what had been paid him?

A. If I don't, how would I know how much to pay him in 1916?

The COURT. Don't argue.

The WITNESS. Now your Honor, it is not fair——

The COURT. He is asking you if what you knew, you knew by hearsay.

A. No, sir, it is hardly hearsay.

The COURT. No argument.

Mr. MCCUTCHEN. I move to strike his testimony as to what was paid for the land.

The COURT. It will be stricken.

Mr. HUSTON. Exception." (Transcript pages 102-103.)

It is apparent from the statements of the witness that the testimony was not hearsay.

VI.

THE COURT ERRED IN INSTRUCTING THE JURY UPON THE SUBJECT OF THE REPRESENTATIONS ALLEGED TO HAVE BEEN MADE BY THE APPELLANT.

This assignment deals with the instructions of the Court upon the subject matter of the pamphlet. The pamphlet in this case is the same as that involved in the appeal of *Sacramento Suburban Fruit Lands Company, a corporation, appellant, v. R. B. Loucks,* No. 5657.

This charge is subject to the same criticisms as offered in the brief in that case and we make the same a part hereof by reference, without burdening the Court with the repetition of it.

VII.

THE COURT ERRED IN REFUSING TO GIVE THE DEFENDANT'S PROPOSED INSTRUCTION ON THE QUESTION OF INTENT.

Reading as follows:

> "The essence of a cause of action for deceit consists in the fact that the false representations were made with intent to deceive, such intent being a necessary element to constitute actual fraud. It must appear from a preponderance of the evidence that the false representations, if any, were made by defendant with a fraudulent intent, and for the purpose of inducing the plaintiff to act upon them." (Transcript page 108.)

This subject has likewise been discussed in the *Walter A. Milen* and other appeals, and the Court is now familiar with the position of the appellant and for that reason the argument will not be repeated.

VIII.

THE COURT ERRED IN INSTRUCTING THE JURY RELATIVE TO THE SUBJECT OF INDUCEMENT.

> "So if you find that these representations of value and adaptation to commercial orchards were an inducement to plaintiff, and influenced him to buy, then you proceed to the next step, which is: Did the defendant know of the falsity of the representations, if they were false, which we will come to later? In these books they represented that it was already proven that the land was adapted to the commercial raising of fruit. There they state it as a fact. If it was not, it ought to be inferred that they knew, because they had every opportunity to know. The land was there. Moreover, if they didn't know it was false, all under the circumstances, considering their relation to the land and their opportunities and their general knowledge, if they ought to have known, it is the same thing as if they did know, because no one inducing another to enter into a bargain can make a positive assertion of fact contrary to the truth if they are culpably negligent in not knowing the truth, and I think you will agree the defendant was in this particular case. That is for your judgment, moulding it by what you would know or ought to know in like circumstances if you were in the position of a company thus handling and dealing with lands over a period of ten years." (Transcript page 122.)

This subject of inducement has also been discussed and the particular point is that appellee was given the right of exchange by his contract. He arrived in California, inspected the property, also had every opportunity to investigate the truthfulness of the statement relative to market value. This instruction, unlike those given in many of the other cases, specifically, told the jury that the Court thought it would agree

that the defendant was negligent in not knowing the truth in this particular.

IX.

THE COURT ERRED IN REFUSING THE INSTRUCTION OF THE APPELLANT ON THE SUBJECT OF THE STATUTE OF LIMITATIONS, AND IN THE INSTRUCTIONS GIVEN BY THE COURT UPON THAT SUBJECT.

Appellant proposed the following instruction upon the statute of limitations:

> "You are instructed that in an action for relief on the ground of fraud, such as this case, the plaintiff must show that the fraud occurred within three years of the commencement of his action for relief, or if his action was commenced more than three years after the fraud occurred, then he must show, in order to maintain his suit, that he did not discover he had been defrauded until a date within three years of the time he commenced his action.
>
> With regard to this discovery of the facts constituting the alleged fraud, you are instructed that the plaintiff will be presumed to have known whatever with reasonable diligence he might have ascertained concerning the fraud of which he complains.
>
> You are instructed that the evidence shows that the alleged fraud was committed more than three years prior to the filing of the action, and your verdict must be in favor of the defendant, unless the plaintiff has proven by a preponderance of the evidence both that he did not discover the alleged fraud within the period of three years before he filed his action, and that he could not have discovered it by the exercise of reasonable diligence, three years before he commenced this suit. He was not permitted to remain inactive

after the transaction was completed, but it was his duty to exercise reasonable diligence to ascertain the truth of the facts alleged to have been represented to him. He is not excused from the making of such discovery even if the plaintiff in such action remains silent. A claim by the plaintiff of ignorance at one time of the alleged fraud and of knowledge at a time within three years of the commencement of his action is not sufficient; a party seeking to avoid the bar of the statute of limitations in a suit upon fraud must show by a preponderance of the evidence not only that he was ignorant of the fraud up to a date within three years of the commencement of his action, but also that he had used due diligence to detect the fraud after it occurred and could not do so. If fraud occurred in this case it was complete when plaintiff contracted with defendant to buy land. Plaintiff commenced his action on 11th day of August, 1927; his contract with the defendant for the purchase of its land was made in February, 1923. If you believe from a preponderance of the evidence that the defendant committed a fraud upon plaintiff in the making of this contract, then before you can find a verdict in his favor, you must also believe from a preponderance of the evidence that he neither knew of the fraud nor could with reasonable diligence have discovered the fraud before a date three years prior to the commencement of his action, that is, before the 11th day of August, 1924. If you believe from a preponderance of the evidence that plaintiff either knew of the facts constituting the alleged fraud before August 11th, 1924, or by reasonable diligence and inquiry could have learned these facts before that date, your verdict must be for the defendant." (Transcript page 109.)

This question is fully presented and argued on a similar instruction proposed and refused, and also the instruction as given by the Court in the case of

Sacramento Suburban Fruit Lands Company (a corporation), appellant, v. R. B. Loucks, appellee, No. 5657. In this case the appellee took possession of the land May 18, 1923, and he has since continuously occupied the same. He did not make a final selection of his lot until after he had been taken over the colony and shown various places. His wife wrote to a Mrs. Olsen. He was shown certain orchards. He says he did not ask a single settler about the fruit. Is not this strange that a man who was so strongly impressed with the representations of the adaptability of this land to the production of all kinds of fruit, should come to California, should visit the land and not make an inquiry upon the subject? He would impress the Court that he was very enthusiastic on the subject of fruit culture. On page 33 of the transcript, he testified as follows:

> "After my talk with representatives of the Company in the east I had in my mind the picture that the Rio Linda Colony was principally devoted to raising orchards. When I came out here I actually found probably a small part of it devoted to raising orchards."

Yet appellee asked no questions and made no investigations, but selected another lot and continued in the possession thereof until 1927 without any complaint to the appellant, or any intimation to any one that he had been defrauded. He then suddenly discovered the fraud although as we pointed out in the appeal in the case of *Miller,* No. 5670, he was able to detect the fraud within a few months. On page 34 of the transcript appellee says:

"I don't know anything about trees and the production of fruit in commercial quantities, so I can't tell you that when I arrived here I found any orchard in Rio Linda which appeared to be producing fruit in commercial quantities."

The story of this appellee is absurd. He was ignorant of many things, matters of which are common knowledge. Any ordinary man can, by observation, form some opinion whether a given section of country is being devoted to the commercial production of fruit. We call attention to his evasion on this subject in the following testimony taken from page 34 of the transcript:

"Q. And now I will ask you once more and then leave it alone. When you arrived here, where did you find any orchard in the Rio Linda district which looked to you like they were producing fruit in commercial quantities?

A. I couldn't tell you because on the Fisher and the creek bottom place Hornbrocker.

Q. How many acres did they cover?

A. I don't know.

Q. Small acres? Ten acres or such? Small orchards?

A. I guess it is more.

Q. How many?

A. Possibly ten or twenty, I don't know.

Q. Outside of that when you arrived here did you find any orchards that looked to you like they were producing fruit commercially?

A. At that time I didn't see any others, because he didn't show me anything else.

Q. During the year after your arrival did you see any orchard on this colony which looked to you like they were producing fruit in commercial quantities?

A. Well, down on the creek bottom.

Q. And about how many acres?

A. I don't know how many acres.
Q. Five hundred or two hundred?
A. I don't know.
Q. Outside of what you saw on the creek bottom, you didn't see any orchards on the Rio Linda colony that looked to you like they were producing fruit in commercial quantities during the first year you were here?
A. I went by Fisher's place and the Terkelson place.
Q. I mean outside of the places that you mentioned?
A. That's what I say.
Q. That's all you saw?
A. Some other. Those I saw around there."

Like all the other plaintiffs he seems to have forgotten all about the representation as to the value of the property until 1927. Can it be said that the plaintiff, by use of reasonable diligence, could not have discovered his alleged misrepresentations as to value? As stated in the case of *Stockton v. Hine,* 51 Cal. App. 131, if the appellant was false in one representation, appellee could only conclude that it was false in all. In all these cases the plaintiffs were strangely silent upon the subject of their failure to discover the representations as to value. That point is practically ignored in every charge of the Court. What has been said in the other briefs referred to and made a part hereof, applies to this case.

The instruction of the Court upon the subject is a very strong argument which excuses action on the part of the appellant and convinces the jury that he had exercised proper diligence.

Again, the charge contains some statements that are not the law. For instance, that part of the charge

relative to hardpan, and the fact that the plaintiff was not a farmer. Also, the statement that he was not obliged to grasp and believe anybody's statement if he heard that the lands were not adapted to the commercial orchards, and: "He would have from five to seven years according to defendant's theory to test it out, if he didn't otherwise find out, that it wasn't adapted to commercial orchards." In this language the Court plainly instructed the jury that the statute of limitations would not be a bar until after the appellee had made a test from five to seven years, unless he otherwise learned that the land was not adaptable to commercial orchards. There is no such qualification in any of the decisions. This is especially emphasized that the Court throughout these charges has sustained the position of the appellee that all of the lands in the colony were represented as being adaptable to the commercial production of fruit in profitable quantities. In fact, the complaint makes this distinct allegation. The Court narrows the duty of exercising diligence to a test of five to seven years, by the actual planting of an orchard on the land purchased. Suppose the plaintiff had not planted any orchard. Under this rule the statute would never run until the plaintiff planted an orchard. His duty to exercise reasonable diligence applied to all of the representations, and to say that he is excused until he had made a test of the particular tract, is in conflict with the authorities.

This charge is also subject to the same objections urged in the other cases that it is argumentative, and favorable to the appellee and unfavorable to appellant. It also singles out the witnesses of appellant and sub-

jects them to criticisms. It omits favorable reference to any of the appellant's witnesses, and in fact, no reference is made to some of its most important witnesses.

The effect of this charge is manifested by the fact that a verdict was rendered in favor of the plaintiff in all of these cases, although in some of them writings of the plaintiff were introduced in evidence absolutely and flatly contradicting the sworn allegations of the complaint. Some of the plaintiffs were experienced farmers and others were not. Yet their experience is identical. It seems almost a miracle that there should be some thirty transactions relative to these lands and in not a single instance where the question of the statute of limitations was involved, was a single party able to discover the misrepresentation as to value, or the colony being adapted to the commercial raising of fruit, or that the land sold was also adaptable to fruit, until 1927. Is this a coincidence, or a shining example of the value of cooperative litigation?

We respectfully submit that the judgment should be reversed.

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